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August 17, 2001

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Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
TW-A325-Lobby  
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

RE: **Ex Parte Presentation**, CC Docket 96-98 (*Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*)

Dear Ms. Salas:

On August 16, 2001, Gary Phillips, Christopher Heimann and the undersigned, representing SBC Communications, Inc. (SBC), met with, Michelle Carey, Kathy Farroba, Jonathan Reel, Renee Crittendon, Uzoma Onyeije and Ben Childers all of the Common Carrier Bureau's Policy Division.

The purpose of the meeting was to discuss provisioning of special access circuits. The attached document was used as a basis for the discussion.

Please contact me at (202) 326-8847 should you have any questions.

Sincerely,

cc: Michelle Carey  
Kathy Farroba  
Jonathan Reel  
Renee Crittendon  
Uzoma Onyeije  
Ben Childers

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**SBC COMMUNICATIONS INC.**  
**AUGUST 16, 2001**  
**SPECIAL ACCESS PERFORMANCE MEASURES**

**I. Performance Measures are Unnecessary**

- FCC has held that it cannot consider the availability of ILEC tariffed services in applying the necessary and impair test. Yet CLECs here claim that because they *rely* on ILEC tariffed services to provide their own services, those services should, like UNEs, be subject to performance measures.
  - The FCC cannot have it both ways. If the FCC is unprepared to recognize that tariffed services are substitutes for UNEs in connection with the impairment test, it should not treat tariffed services as substitutes for UNEs for PM purposes.
  - The fact is that tariffed services *are* substitutes for UNEs and should be treated as such for *all* purposes. Even so, however, PMs are unnecessary and counter-productive for the reasons discussed below.
- The special access market is highly competitive.
  - Competition is more mature than in other LEC markets; customers are larger and more clustered.
  - 349 carriers provide special access service (compared with 109 at time of *UNE Remand Order*)
  - According to New Paradigm Resources Group, CLEC's have 36% share of the special access market.
- The FCC has recognized that there is enough competition in the special access market to constrain anticompetitive pricing.
  - FCC has granted special access pricing flexibility in MSAs accounting for 80% of special access revenue. It has granted Phase II relief in MSAs accounting for 2/3 of special access revenues.
  - FCC has recognized that the test used – collocation – “offers a guidepost for determining whether there is a competitive presence sufficient to restrain a price cap LEC's incentives to charge unreasonable rates.” FCC D.C. Circuit Brief, 7/20/2000 at 14. Stated differently, the FCC found that when the triggers were met, there was enough capital investment by competitors to “alleviate concerns about anticompetitive pricing.” *Id.* at 28; *see also id.* at 37

and *Pricing Flexibility Order* at ¶ 144.

- *Given that the FCC has found that the pricing flexibility triggers constrain an ILEC's ability to set unreasonable prices, how could the FCC conclude that the ILECs simultaneously maintain the ability to sustain unreasonable service quality?*
- FCC has repeatedly concluded that *decreased* regulation should accompany increased competition. E.g., in its brief to the D.C. Circuit supporting a pricing flexibility framework for ILEC special access services, the FCC said “Congress anticipated in adopting the 1996 Act that increased competition would go hand in hand with reduced regulation.” (FCC Brief at 8)
- Special access tariffs already contain PMs and penalties for missing targets.
  - These PMs were added in response to growing competition for special access – evidence that the market works.
  - Indiana Commission recently recognized that these PMs and penalties are sufficient:
    - “Ameritech Indiana provides performance data to CLECs for services they purchase. Service credits are available when performance parameters are not met. Therefore, the Special Access tariffs address the issue of what remedies exists if Ameritech fails to perform. If the tariffs are insufficient, or if Ameritech fails to perform pursuant to the tariff, the proper course of action is a complaint against Ameritech or a request for an investigation in the appropriate forum. Thus, protections are in existence for CLECs who purchase Special Access service out of Ameritech Indiana’s tariff.” IURC, Cause No. 41657, 8/8/01
- SBC also has entered into contracts that provide carriers additional protection.
  - For example, more than 1/3 of SBC’s special access revenue is subject to what SBC refers to as MVP tariffs. These contract-based tariffs contain performance standards that go beyond the standard tariff provisions. They also contain liquidated damages penalties for missed targets.
    - SBC is currently negotiating MVP arrangements with multiple other carriers and hopes to serve even more of its special access traffic pursuant to such arrangements by year end.
  - SBC has collaborated with WorldCom to fashion an extensive Access Performance Measurement plan. Pursuant to this plan, SBC measures, among other things, On Time Performance, New Circuit Failure Rate, Mean Time to

Restoral. All in all, SBC provides WorldCom 38 access performance measurements on a monthly basis. Following implementation of this plan, SBC's, and in conjunction with other initiatives by SBC to improve special access provisioning, special access performance levels increased.

- SBC likewise has negotiated a special access performance plan with AT&T. In fact, when the Texas PUC was considering establishing special access PMs, AT&T asked the PUC not to preempt the application of the PMs it had negotiated with SBC. 6/29/01 Special Access Workshop.
- In all of these cases, the market, not regulation, drove SBC to work with its special access customers to address their needs. The reason is simple: there is lots of competition for special access services and special access is a huge growth market – one that no carrier can afford to neglect.

## II. PMs Will Distort the Market and Limit Customer Choice

- The market is working. The Commission should not preempt the market and substitute regulatory solutions for market solutions.
  - Regulatory “solutions” of this nature are inherently problematic. It is extremely difficult, if not impossible, for *any* administrative agency to establish the “right” PMs in the first instance – assuming there even is such a thing – much less to ensure that those PMs are revisited and updated on a timely basis. The FCC should avoid micromanagement of this nature, particularly here where there is every reason to believe that the market will address any performance problems.
- Carriers can negotiate the level of service they require and for which they are willing to pay. Particularly with pricing flexibility, ILECs now have a much greater ability to enter into contracts that are designed to meet the quality and pricing needs of individual customers.
  - Some carriers may prefer to pay for a Chevette. Will regulation *limit* their options?
  - Regulatorily prescribed PMs would fly in face of *Pricing Flexibility Order* wherein FCC recognized that pricing flexibility allows for the more efficient provision of service and promotes competition. ¶¶ 59, 128
  - How would PMs affect contracts and contract negotiation process? Would carriers be free to agree to lower standards for a lower price?
  - Would the standards apply to existing contracts? If the standards are, in any way, stricter than provided for in existing contracts, would that entitle the

ILEC to renegotiate the price?

- The Commission should avoid injecting asymmetric regulation in this growingly competitive market.
  - 80% of our special access revenue comes from ¼ of the wire centers in which we offer special access (less than ¼ of our total wire centers since we don't provide special access in all wire centers). There are CLEC competitors in most, if not all, of these wire centers. If the FCC adopts PMs for ILEC special access services, those measures should also apply to our competitors' services.
  - The FCC has long recognized that asymmetric regulation distorts competition by subjecting one set of players to a different set of regulatory rules and costs than their competitors.
  - Asymmetric regulation also encourages regulatory gamesmanship.
    - It is no accident that Time Warner Telecom – which derives a portion of its revenues from special access service (62% according to its most recent 10Q) – is a proponent of these PMs. Subjecting SBC to inflexible, regulatorily prescribed PMs, ties SBC's hands in the marketplace and reduces its options to negotiate arrangements that are tailored to individual customer needs.